



THE BINDING EFFECT OF CONTRACT AND REMEDIES FOR NON-PERFORMANCE IN PARTICULAR TO SALE CONTRACT

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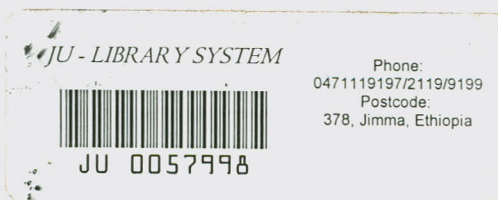


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Introduction

If there is some thing worth to give attention to asses whether the provisions of contract lauefully formed has binding effect up on parties as if they usere law or not, it is to look in to remedies available for the aggrieved party in case of non-performance and evaluate their adequacy. This will be done by looking in to the contractual remedies available under Ethiopian contractual law, the preconditions that the aggrieved party is required to met so as to demand those remedies in light of remedies available in other countries and the compensation goal of contract remedies.

why
remedies
only

The act of entering into contract is a prior appreciation and acceptance of the relationships outcomes which result from the interaction. Under our law, where freedom of contract is the guiding principle one may or may not enter in to contractual obligation. It goes with out saying contract is a legally enforceable agreement, once entered that transaction, the way out shall be limited; the obligation is to be governed by the mandatory provisions of the law and the terms of the contract; and as the definition puts, it is enforceable agreement before the court of law.

In this Work the Writer would like to Work on the crucial point "The binding effect of contract and remedies for non-performance, in particular related to sale". The writer is moved to focus on this point owing to the fact that contracting parties desperately expect and look for the performance; no one can be willing to hear even to think about non-performance. The law also by providing the guiding principle under Art 1731(1) of the civil code "Provisions of contract lauefully formed are one binding on parties as if they were laws". favors performance of the

contract and tries its level best to facilitate towards performance. Despite all these things, non-performance as a matter of fact, it often occurs in contractual relation ships. At this conjecture, the aggrieved creditor usually get confused and needs some compensatory remedy. The judge, arbitrator, or interested party would like to know the outcome of the already established relationships. And of course the law has blessed the aggrieved creditor with its remedies.

This paper aims at analyzing the binding effect of provisions of contract on parties as if they are laws and remedies for non performance. That is it is the provisions of contract lawfully formed that binds contracting parties to discharge their respective obligations. But as a matter of fact non-performance often occurs, and the law provides remedies as damages, cancellation, specific performance and price reduction. Among these remedies it is the first two remedies cheaply available. And in this work special focus has been made to specific performance and here what interests the writer most is provisions of contract lauefully formed are binding up on parties as though they were laws being the guiding principle, shouldn't it specific performance be routinely available remedy?

don't mean always?

The other important issue the writer tried to address is that are the remedies available adequate or fully compensatory, do they guarantee to say contract has binding effect on parties as if it is a law? do the available remedies make effective art 1731(1) as it is found on the paper or does the guiding principle remain king of paper? The inns of the paper revolves around these and other issues reference has made to laws of common law countries (England)

why? what is the nexus between common law and civil law?

For these purpose, the paper has been divided in to three chapters. The first chapter is an introductory matter dealing with definition, meaning

and elements of contract various advantages of contract for the society and theories of contractual obligations that backs the binding effect of contract and their incorporation under Ethiopian contract law are also dealt within this chapter.

The second chapter is devoted on remedies of damages and specific performance for the aggrieved creditor in case of non-performance. Since the work of this paper is particularly related to sale contract, the writer in this chapter has tried to see in detail manner instances of non-performance that entitles the aggrieved creditor (seller or buyer) to these remedies and the prerequisite the creditor is required to met so as to demand these remedies.

The third chapter is highly concerned with remedies of cancellation (unilateral or judicial) and price reduction. Instances of non-performance that entitles the aggrieved creditor to remedy of cancellation (judicial or unilateral) are dealt within this chapter. Situations in which the aggrieved creditor may cancel the contract unilaterally are also dealt here. Since, remedy of price reduction is available exclusively for the buyers, in this chapter the writer has tried to see instances of non-performance that entitles the buyer to this remedy.

✶ In a different section in this chapter, the core of the paper, evaluation of adequacy the remedies available under Ethiopian contract law so as to say whether they are fully compensatory or not, is made. In this section the writer has tried to address the issue that since the guiding principle is that contracts lane fully formed bound parties as if it is a law, shouldn't it specific performance be routinely available remedy? Finally, yet importantly this paper ends with conclusions and recommendations.

CHAPTER ONE

WHY SHOULD CONTRACTS BE BINDING?

1.1. Concept

i. The meaning of contract

The word contract is used differently to name different things. In different literatures, its possible meaning has been explained, but generally, the word is often used to denote the following ¹

1. Agreement
2. The physical document sets forth such an agreement
3. A body of law dealing with such agreement
4. The terms of an agreement.

only its meaning as «agreement» is importantly relevant here, because only its meaning as « agreement» require detail explanation and most importantly relevant here that is the bases for the existence of the other, and it has different legal consequence quinces. Accordingly, the word contract may mean the following agreements ²

1. An enforceable agreement between two or more parties to do or not to do a thing or set of things.
2. An agreement between two or more parties creating obligations that is enforceable or otherwise recognizable at law.

The law only recognizes and enforces certain agreement. Accordingly an agreement may be either enforceable or unenforceable at law.

It is only an enforceable agreement that the explanation should focus on because it has different legal effect. Mostly, in most legal materials the

word «contract » is also intended to mean this. In this respect it has been given different definition by different legal scholars in different literatures. Salmond defined a contract as an «agreement creating and defining obligations between the parties» ³

According to this definition, contract is, principally agreement. However, not every agreement is contract because some agreements may not create obligations. Thus, according to the definition, Salmond want to mean legally enforceable agreement. As to this definition, only those agreements, which create or define obligation, which would exist in relation between parties are said to be contracts. This definition may not be comprehensive since it requires a subsequent definition of the circumstances under which the agreement could in fact create obligation enforceable in the eyes of the law.

William Anson, define a contract as: «An agreement enforceable at law made between two or more persons by whom rights are acquired by one or forbearances of the part of the other or others» ⁴

According to this definition too, contract means a legally enforceable agreements. Similarly, this definition requires a subsequent definition of the circumstances under which the law does in fact attach obligations to agreement.

ii. Definition of Contract

There is no a single whole definition of contract in existing legal materials. In black's law, dictionary contract is defined as:

7 «An agreement between two or more parties creating obligations that is enforceable or otherwise recognizable at law» ⁵

→

« A promise or set of promises by a party to a transaction, enforceable or otherwise recognizable at law» ⁶

As have seen from each of the definition given above, any one of the definitions could not give fully the meaning of contract. This is because contract in addition to its being an agreement or promise; it shall coupled with other elements such as physical acts, recitals of fact and usage. In deed contracts more than a promise or agreements include the entire complex of these elements ⁷ More over, contract unlike mere agreement or promises, for a breach of which the law gives a remedy or in someway, the law recognizes its performance as a duty. Thus, it would be very difficult to compress this entire feature of contracts in a single sentence.

In different legal system, the contract laws of a country attempts to give definition to contracts.

In Indian law, contract means an agreement enforceable at law ⁸ According to this definition; a contract consists of two elements, i.e. an agreement, and legal obligation. An agreement to become a contract, contracted it must give rise to a legal obligations. Thus, an agreement is a wider term than a contract. A contract may not include agreements of moral, religions or social nature. As such, obligations, which one not contracted in nature, are out side the purview of the law of contract.

In English law, contract means a promise. ⁹

The law obligates the one who promise to another to perform the same. Accordingly, for the existence of the contract, at least there must be an agreement between two persons. This doctrine was also recognized in USA in the United commercial Code (UCC). ¹⁰

→ promise ?

→ what doctrine ?

In continental Europe contract is defined as an agreement to create, vary or extinguish rights and obligations (Art. 1101 of French civil code and art. 305 of German civil code).¹¹ This definition is synonymous to the definition given by Ethiopian contract law. The Ethiopian contract law defines contract as an agreement where by two or more persons as between them selves create, vary or extinguish obligations of a proprietary nature. ¹²

As to this definition, the machinery of contract law gives an agreement protection and enforceability to enable it to form, vary or extinct obligation.

According to the definition given under Ethiopian Civil code, one is not allowed to make contract with himself. That is for the very existence of contract, the presence of two or more persons is a must. That created contract will have effect only up on contracting parties. That is the provisions of a contract will have effect on parties to the contract and that contract shall not have effect on third parties. The other important point is, a given agreement to be contract, that contract should relate to an object, which can be changed into propriety. That is the object of the contract should have monetary value. Thus contract pf marriage, contract of adoptions, generally, contract of status is excluded in our civil code.

iii. Advantages of contract in a society.

Contract has a number of advantages in a society. And if there is some thing worth to give attention to ensure free market economy, it is contract, which is indispensable as far as secure market transaction is sought. Contract is facilitator for the well functioning of the wheel of any economy; ¹³ with out it the real life of individuals will be hard to imagine, the connotation is simple that one will only be discouraged to enter into a contract, if he is self-

sufficient. However given the scarce resource, limited skill and knowledge, the need to contractual Involvement is so inevitable. Contracts are probably a necessary device in any kind of market economy where goods and services are exchanges by people acting in their own interest. People might not enter in to agreements that call for some future performance unless they know some means exist (the law) to force other people to honor their promises. For example, a small business might be afraid to supply its goods to a large corporation in exchange for the corporations promise to pay for them next month unless the business knows it could have outside help to force the corporation to pay.

It is also true that it would probably be impossible to have an industrialized, market economy with out contracts. A manufacturer would be unable to do the kind of planning necessary to run a business if it couldn't rely on agreements with suppliers to furnish the raw materials needed to make its products. Similarly, a manufacturer might not be willing to commit itself to buy raw materials or hire employees if it could not rely on buyers, promises to buy its products ¹⁴

It is not surprising, then, that the contract was accepted as the basis for business transactions at a very early point in history.

IV. Elements of Contract

Even if we said that there is no single whole definition of contract in existing legal materials, most of the definitions given by different legal authors states contract as an agreement. Here, what the writer wants to emphasis is that not all agreements are contracts. A given agreement to be contract there are there are a validity requirements to be full filled The requisites for the existence of



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valid contract are provided under Art. 1678 of the civil code. This art. provides that " no valid contract shall exist unless

- a. The parties are capable of contracting and give their consent sustainable at law.
- b. The object of the contract is sufficiently defined and is possible and lawful;
- c. The contract is made in form prescribed by law, if any. Therefore, the elements that make a given contract valid are capacity, consent, object and form, if any.

As regards the capacity of the parties to the contract, art 192 of the civil code establishes the principle that capacity is the rule, incapacity is the exception. It is only in accordance with a specific provision. of law that a person can be considered incapable and unable to conclude a valid contract. In other words, in the same way that all physical persons enjoy all rights and duties, they are capable of exercising the same; there must be an explicit declaration of the law to that effect before some one can be considered incapable ¹⁵

This principle is also reinforced under art 196 of the civil code, which envisages that capacity is presumed; if incapacity is alleged by some one, it must be proved by that person ¹⁶

Art 193 and 194 of the civil code divide incapacities in to two, general incapacity which depend on age mental condition or penal sentence; and special incapacities which depend on nationality or functions for various persons who are prevented under special laws from exercising rights and duties in connection with Special function which they perform most after in public life, but also in a private capacity. ¹⁷

Pursuant to art 199(3) of the civil code, the minor who has not attained the full age of eighteen years may not perform any judicial act except what the law allows him to do. Then, if he concludes a contract, it may be invalidated. But the law expressly provides the circumstances in which the minor can validly perform an act sustainable at law and how the minors are represented to perform a judicial act.

In the case of insane or infirm persons whose condition is not notorious or apparent, their condition is with out special effect on the juridical acts they perform ¹⁸

Yet, the insane person may obtain the annulment of juridical acts if his insanity or infirmity has been the cause of such defect in performing them ¹⁹ and this annulment (invalidation) may be done by that person, by his representatives or by his heirs.

Regarding the judicially interdicted person, art 358 of the civil code establishes the principle that they are subject to the same rules of protection as minors. Thus, they can only conclude a contract where they are specifically allowed to do so under the law. In a similar fashion, judicial acts performed by a legally interdicted person in excess of his powers given by law shall be of no effect ²¹ These acts may be invalidated by the interdicted person, the person with whom he has contracted or the public prosecutor as though the subject matter of the contract performed where ivicil ²² Foreigners, also, may not own immovable property situate in Ethiopia (Art 390 of the civil code). This shows that they are incapable to conclude sale contract to buy immovable situate in Ethiopia.

The other element required in order to make a valid contract is the object of the contract which refers to the obligation under taken by the parties not the things to which those obligations relate. A contract is of no effect, unless its object is sufficiently defined, possible and lawful. In other words, the lack of an effective (sufficiently defined, possible, lawful) object makes the contract non-existent, null and void. Pursuant to Art 1714 of the civil code the obligations of parties or one of them should be ascertained with sufficient precision, and they shouldn't be impossible which is absolute and insuperable (Art 1715) and the obligation of parties or one of them should be unlawful or immoral (Art. 1716) generally, in order for there to be a valid contract, the object of the contract must not be impossible in itself; it must not be illicit or immoral because the court may not order a contract to be performed.

Also, in order that an existing contract be fully valid, the parties must give their consent. That is, consent is the primary requirement for the existence of contract ²³ That is, the contracting parties must give their free and full consent for the existence of the contract. The consents expressed must be free from defects, Art 1679 the civil code emphasizes the overriding importance of the parties consent for the formation of the contract and the definition of its contents, but goes further and specifies that in order for a contract to exist the parties must intend their agreement to have an obligatory character. In accordance with this art, there is no legally binding contract in the case of a simulated contract or where declarations are obviously not intended seriously.

²⁴ The underlying principle is that consent should be true, free and sustainable at law.

The other conditional element of contract is form. As regards the form of the contract, the general principle is that special form is not required in order to make valid contract ²⁵ But where a special form is required by law, such

form shall be observed as envisaged under Art. 1719(2) of the civil code. There is freedom of form unless otherwise provided by special rule

In principle, capacity, consent and object are sufficient and there are no formal requirements for the conclusion of contracts. This principle, however, is set aside in two cases; where the law requires that a particular contract be made in a special form and where the parties themselves have provided that their contract will be concluded in a particular form. If the law or an agreement of the parties provides that the contract must be concluded in a particular form, failure to observe that may result in the invalidation of the contract ²⁶

1.2. Theories Of Contractual Obligation And Their Incorporation Under Ethiopian Contract Law.

Generally we do have four theories of contractual obligation. ⁵

1.2.1. Consent theory

²³ The mere fact that one promises something to another creates no legal duty and makes no legal remedy available in case of non performance. To be enforceable the promise must be accompanied by some other factors. The question what facts must accompany a promise to make it enforceable at law will be answered in due assessment of the four most popular theories of contractual obligation ²⁷

Consent theory posits that contractual Obligations can't be completely understood unless it is viewed as part of a broader system of legal entitlements. Such a system based in morality specifies the substance of the rights individuals may acquire and transfer, and the means by which they may do so. properly understood, contract law is that part of a system of entitlements

pact sunt servanda!

that identifies those circumstances in which entitlements are validly transferred from person to person by their consent. According to this theory contract has binding effect on parties since parties from the very beginning enters in to that contract by their own consent. This theory has some thing to do with «Pact sent veranda » That is, parties as long as they give their consent to the details and provisions of the contract they should be bound by those terms. ²⁸

Finally, a consent theory's account of contractual obligation expeaths and justifies the historically recognized defenses to contractual obligation. This theory explains that since parties at the time of entering in to contract gives their consent for every details of provisions of the contract, they shall be bound by their consent to perform it.

es In Ethiopian, contract law consent, as found under art. 1678(a) of the civil code, is one of the validity requirement. It is also stated under art.1679 of the civil code that a contract shall depend on the consent of the parties who define the object and every details of their under takings and agree to be bound there. *thereby* It is by their consent that parties define each and eury provisions of the contract and bound there by And our civil code under art. 1731 (1) provides the principle of pact sunt servanda that a provisions of a contract law fully formed shall be binding on the parties as though they were law. That is ones parties give their free and full consent sustainable at law, they shall be bound by their consent. Generally, Ethiopian contract law asserts that parties to the contract shall be bound by the provisions of the contract provided that they give their consent. And consent theory of contractual obligation also asserted the same thing so we can say that this theory is incorporated in Ethiopian contract law.

1,2.2. Reliance theory

ST This theory is named one sided party based theory because this theory is primarily concerned with protecting the promisee. Reliance theories are theories that explain contractual obligation as an effort to protect a promisee's reliance on the promises of other.

ST This theory have the apparent virtue of explaining why persons may be bound by the common meaning of their words regardless of their intentions. Thus, it has become increasingly fashionable to assert that contractual obligation is created by reliance on a promise. Reliance theory is based up on the intuition that we ought to be liable in contract law for our assertive behavior when is creates foreseeable « or justified lenience » in others.²⁹

ST Reliance theories have nonetheless faced a seemingly by insuperable difficulty. That is as mores when wrote as easily as 1933 « clearly not all cases of another are actable, and the theory before us offers no cure as to what distinguishes those which are » The deficiency has led necessarily to the implemented of such purses as justifiable reliance or reasonable reliance. The as adjectives however, unrelated to reliance is self, because whether justified or unjustified or reasonable or unreasonable reliance is present in any event.³⁰ not clear

Further more, whether a person has reasonably relied on a promise depends on what most ought would or pulped to do. We can't make the assessment independently of the legal rule infect in the relevant community because what many people would do in reliance on a primacies crucially affected by their

not clear
perception of whether or not the promise is enforceable. Aberrance theory, therefore, ultimately does no more than pose the conical question that it is supposed to answer is this the promise that should be enforced?

unhappy
The analysis is no different if we ask whether the promissory knew or had reason to know the promise would induce others to act reliame, even though. this formulation lessens a reliance theory's preference for the promisee's interests.

A Prediction that a promise can reasonable be expected to induce reliance by a promisee or third party will unavoidably depend up on whether the promise or a third party believes that reliance will be legally protected " Further more , if a promise is defined as a manifestation of intention to act or refrain from action in a specified way, so made as to justify a promise in understanding that a commitment has been made " . Then it would seem that evenly promise should have expected the promise to relay, but whether the extent of the promise's reliance was reasonable, . But this returns us once again to the difficult of discerning, reasonable relevance.³¹

By
By providing an overly expansive criterion of contractual of contractual obligation, any theory that bases obligation on detrimental reliance begs the basic question to be resolved by contract theory: Which potential reliance inducing actions entail legal consequences and which do not? A persons action in reliance on a commitment are not justified and therefore legally binding, simply because s/he has relied. Rather reliance on the words of others is legally protected because of some as yet undefined circumstances

These difficulties reveal that reliance theories have problems, that is it must resort to definitions of contractual enforcement that do not follow from

Rept.
- potential reliance
- detrimental " 12

reliance, but one based on more fundamental principles that are left unarticulated. By failing to distinguish adequately between those commitments that are worthy of legal protection and those that are not, the alliance theory failed in its basic mission ³²

As reliance theory focuses on protecting the interests of the promisees, as a result, it can't properly assess the interpretational quality of the process of contracting. The law of contract exists to facilitate transactions between persons. In such an enterprise, there is no obvious reason why one party shall be automatically preferred. Regardless of all these shortcomings of the theory, reliance theory, plays an important role for contract to have binding effect on parties ³³

Reliance theory is criticized because it fails to distinguish between those reasonable reliance which are distinguishable from those which are not. That is it should not be all reliances on the common meaning of words of the promisor needs action rather the reliance has to be reasonable one. When we come to Ethiopian contract law, it is difficult to say the reliance theory that backs the binding nature of contract is incorporated as it is. But we can say that it is incorporated as it is criticized, that is, as we see earlier consent of parties is essential element to have valid contract, and parties can declare their consent through offer and acceptance which are the two important steps for the conclusion of contract. And as stated under art. 1681(1) of the civil code declaration of offer and acceptance may take different forms, among these conduct is one. That is when there is no doubt as to the parties agreement, conduct of parties may give the implication that they accept or offer the contract. That is if the behavior or conduct of the promisor induces the promisee to rely reasonably on the words of the former, then the promisor is duty bound to perform his promise or to keep the promise.

1.2.3. Contemporary Theory Of Contract

This theory of contract is highly concerned with social contract. A contemporary contract theory is, characteristically a doubly hypothetical. Certainly no prominent theorists thinks that questions of legitimacy and obligations are settled by an actual survey of attitudes towards existing arrangements, and are not settled until such survey has been carried out. The question then is not are these arrangements the object of an actual agreement amongst parties? The question rather is would these arrangements be the object of an agreement if parties were surveyed,³⁴

Although both questions are, in some sense, susceptible to an empirical reading, only the latter is in play in present day theorizing. The contract now a days is always hypothetical in at least this first sense.

There is a reading of the first order hypothetical questions "would the arrangement be the object of agreement if " which as indicated. is still resolutely empirical in some sense. This is the reading where what is required of the theorist is that she/he try to determine what an actual survey of actual parties would reveal about their actual attitudes towards their system of social arrangements. But there is another reading that is more widely accepted in the contemporary context.

This theory highly concerned with social contract which is not legally binding. Hundreds and thousands of social contracts are concluded in each minute. This is because such contract is easier than the legal contract in that there is no need of the fulfillment of some requirements, such as the presence of



witnesses, the registration of contract in appropriate state organ, the conclusion of contract in written form etc.

This theory propose that one can only be obliged morally but not legally to per tom his promise.

Contemporary contract theorists tend to be constructivist in the sense that they recognize no in depended and determinate external standard of legitmacy that the contractual device is intended to approximate, but rather make the truth maker for social agreement is legitimate. Being agreed to make a regime legitimate it is not that being agreed to it is evidence for legitimacy other wise conceived.

Generally this theory propose that a person shall be bound by the social agreement by which other individuals are bound.

On this reading the question really is no longer a hypothetical question about a hypothetical reaction, it is as said earlier, doubly hypothetical. The question for most contemporary contract theorists, then is " if we surveyed the idealized surrogates of actual parties in this polity, would current social arrangements be the object of an agreement for them?

This theory generally asserted that contraction parties shall be bound by the terms and provisions of the contract because it is the social agreement that persons shall be bound by their words.

1.2.3.4. Fairness Theory of Contract

This theory propose that contracting parties as long as they conclude a valid contract, they shall also be bound by the terms of the contract and they shall discharge their respective obligation according to the terms of the contract. And failure to perform the contract will not be fair in the eyes of reasonable man standard. That is once the parties entered in to contract by their own free will it would not be fair to fail to discharge their obligation under the contract. This theory is also termed as a standard based theory because this theory considers the farmers of one's failure to discharge his contractual obligation from a reasonable man standard point of view.³⁵

Chapter One

End Notes

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CHAPTER TWO

Specific Performance And Damages For Breach Of Sale Contract.

In the whole field of law there is no right without a remedy¹. The reason that this statement is true is that the only useful test as to the existence of a right is that some legal remedy is provided. It is somewhat more enlightening to say that, where no remedy is provided, there is neither right nor duty. Similarly, in contract transaction the act of entering into contract is a prior appreciation and acceptance of the relationship's outcomes which result from the interaction. And the contracting party desperately expects and looks for the performance; no one can be willing to hear even to think about non-performance. The law favors performance of the contracts and tries its level best to facilitate towards performance, as our law says contract once formed is binding between parties as if it is a law. But non-performance as a matter of fact, it often occurs in contractual relationships. At this conjecture the parties usually get confused and need some assistance. Accordingly one of the parties may refuse to perform the obligation for the asserted reason that his contractual obligation has been excused or terminated. The other party claims breach and if here is breach the law has a remedial mechanism to compensate the party who was honest and willing to perform his obligation.

The purpose of contract remedies is to place a disappointed promisee in as good a position as he would have enjoyed had his promisor performed² contract. Law has two methods of achieving this compensation goal³; requiring the breaching party to pay damages, either to enable the promisee to purchase a substitute performance or to replace the net gains that the promised performance would have generated; or requiring the breaching party to render

the promised performance. The present chapter and immediately succeeding chapter deal with those judicial remedies namely, specific performance, damages, cancellation and price reduction. And the written will try to evaluate the adequacy of these remedies to say contract is really binding on parties as if it is a law and this would be done by examining the remedies available for non performance contract in Ethiopian law in light with remedies available in other legal system.

2.1. Specific performance

In the civilian system, specific performance is often stated to be the primary remedy for a breach of contract⁵. On the other hand, in common law, specific performance is an equitable remedy, which is only available in the discretion of the court, and serves as a supplementary remedy, only to be granted when damages were inadequate.⁶ In Ethiopian civil *con de*, specific performance can impose on the debtor where the following conditions fulfilled.⁷

1. The creditor's special interest¹
2. Preservation of the debtor's personal liberty

A creditor is said to have a special interest in the performance of the obligation by the debtor, logically when the other remedy (cancellation, and/or damages) are not adequate. In addition, except the performance of the same, no way can be sought to make good the breach: it may be because that the contract concerns a unique subject matter. Here the code seem leaning in the direction of common law solution, in the sense that the allegation for specific performance is subject to, some what to courts discretion of their analysis of where or not the creditor has special interest in the obligation. Historically, courts of equity will act only where there is no adequate remedy

at law⁸. So much so, it can be said that specific performance is ordered where a creditor has special interest in the performance of the obligation⁹. The creditor has special interest where the obligation could not match to a substitute remedy other than its enforcement. In other words where the obligation cannot be made good by substitution of the remedies other than its enforcement, it could be said that he has special interest to the specific enforcement of the obligation. The rationale is that why specific performance will or should in fact be ordered, while the debt should in fact be made good by other substitutable remedies. Thus, it can be said that specific performance in Ethiopia is as equitable remedy as the common law does. However, in common law since damage is considered “a legal” remedy for breach of contract¹⁰ the adequacy of remedy is sought in relative to damage only. On the other hand, in Ethiopian law it is in relative to all the other remedies of non-performance that inadequacy will /should be sought.

The next requirement to award specific performance is that the performance could not have affected the debtor's personal liberty. According to this requirement, specific performance could not be ordered where it affects personal liberty of the debtor.

As it has been said above, specific performance is interest in the performance of the obligation and where the enforcement of which could not affect the personal liberty of the debtor¹¹. In construing what constitutes special interest or what affects the personal liberty of the debtor, though it seems discretionary, the court should exercise in accordance with principle and has to take into account a wide range of considerations. Thus, the requirement for ordering specific performance being only the creditor's special interest and the fact that the enforcement of which could not affect personal liberty, the court could not take other moral considerations into an obligation of where

performance cause the debtor unreasonable effort or expense apart from affecting his personal liberty.

This is the consequence of the principle that courts could not 'make contracts for the parties'¹²

As to George Krzeczunorucz in his book entitled: "Formation and effects of contracts in Ethiopian law", the phrase 'social interest' seems included to exclude specific performance of nonstructural promise of personal nature¹³, such as a promise by an artist, writer or actor or employment contract.

However, this duty [special interest requirement] is lifted by the law under Art. 2892 of the civil code in relation to sale of immovable. Here the party who seeks forced performance is presumed to have a particular interest in the forced performance of the contract 'There is a legal presumption that the buyer has a special interest in acquiring the immovable in question. He doesn't have to prove that he has a particular interest in the immovable.'

2.1.1. Instances of non-performance which entitles the buyer to demand forced performance

The seller is legally bound to warrant the buyer against any total or partial dispossession and, that the seller is obliged to guarantee to the buyer that the thing sold conforms to the contract and is not affected by defects¹⁴. The warranty obligation of the seller is a law emanating obligation rather than the creation of agreement of the parties¹⁵. But the seller may break this obligation either by repudiating or not making any delivery at all or by making delivery which does not conform to the contract. The seller may deliver

defective thing or a thing which doesn't possess the necessary quality for its normal use, particular use or commercial exploitation. The buyer may also suffer the risk of dispossession by third parties who have right over the thing when the seller transfers defective title to the buyer. Under such circumstances the law has remedial mechanisms, which the buyer may, resort to.

In case of breach of warranty various remedies are available to the buyer against the seller where the requirements of Art. 2282, 2288 and 2289 of the civil code are satisfied. among the remedies available to the buyer are specific performance (2332), cancellation [Art. 2342-2346]

Claim for damages (Art. 2360) and price reduction (Art. 2343(3) of the civil code

Under Art 2332 of the civil code it is provided that the buyer who has regularly give notice of the defects may require the seller to deliver new thing or missing part or quality of the thing where the forced performance of the contract may be demanded. In the sense of this article 'acquiring things or the missing part or quality of the thing is taken to amount to forced performance of the contract. As we proceed, we are going to see that this article contained important elements like the duty to regularly give notice about the intent for the forced performance and the requirement that the conditions to require forced performance are satisfied. The back ground for this art 2332 is Art 1771 (1) of the civil code which states that where a party doesn't carry out his obligation under the contract, the other party may according to the circumstances of the case, require the enforcement of the contract" The phrase enfacement of the contract is what is described under Art. 1776 of the civil code as specific performance or forced performance.

The party requiring the forced performance of the contract (usually the creditor) has to prove to the satisfaction of the courts that he has special necessity in the performance of the contract and that the contract can be forcibly be performed with out affecting the personal liberty of the debtor¹⁶. Of course, in a contract of sale as found under Art 2329 and 2330 of the civil code, we don't have the fear that the personal liberty of the debtor will be affected owing to the forced performance of the contract. This is because in sale contract the obligation of the debtor is just to give and this act in no way affect the liberty of the debtor.

Article 2332 (1) of our Civil code provides that the buyer up on breach of warranty, may require the seller to deliver new things or the missing part or the quality of the thing where the forced performance of the contract may be demanded. It is only when the forced performance of contract may be demanded that it becomes a remedy in case of defect and non- conformity.

Art 2332 governs also cases of non - conformity. According to the sprit of this Article, the buyer may not only demand the forced performance of the contract but also the replacement of the missing part or quality of the thing sold. The phrase " missing part" may refer to non - conformity of the thing sold provided that the part delivered is not under use. Because it would be difficult to talk of non-conformity if the thing is already under use. Missing part shows that there is partial delivery, which is one typical case of non-conformity ¹⁷. Under are 2288 (a) of the civil code it is provided that the thing shall not be deemed to centum to the contract where the seller delivered to the buyer part only of the thing sold or greater or lesser quantity he undertaken in the contract to deliver. There fore, non-confunty should be readable into Art.2332 of the civil code.

Now when we turn to the main elements of Article 2332(1) of the civil code, the main question to be answered is under what circumstances would the forced performance of the contract be demanded by the buyer in cases of defect and non-conformity. The answer for this is where the requirements of arts 2329 and 2330 of the civil code are satisfied .

As a matter of principle according to Art. 2329 of the civil code , the buyer may demand the forced performance of the contract where seller has not regularly according to their agreement delivered the thing to him. Unlike Art 1776 of the civil code, what constitutes particular interest in a contract is clearly enumerated under art .2330 of the civil code.

Firstly, is there the possibility of purchase in replacement of the thing by the buyer? The answer for this question would show whether or not the buyer has particular interest in the forced performance of a contract under art.2332. That means can't the buyer purchase the thing sold to him from another seller? Is it the seller only who deals in the kind of the thing sold to the buyer? If the answer to this question is yes, then the buyer can't purchase the thing in replacement from another seller and hence the buyer can be said to have particular interest in the forced performance of the

Secondly, although it may be established that purchase in substitute may be carried out, if the buyer is going to suffer a lot of inconvenience to carry out the purchase in replacement, then the buyer has particular interest and may be granted the forced performance remedy. The inconvenience may be time wise or money wise. But if the buyer can effect the purchase in replacement without inconvenience it can't be said there is particular interest on the part of the buyer since he has no problem to purchase the thing.

Thirdly again, even if it is possible to accomplish purchase in replacement without inconvenience, if the buyer has to pay a lot by way of price to perform the purchase in replacement, then it may be considered that the buyer has special interest in the forced performances the contract⁴. If the purchase in replacement costs the buyer some additional considerable expense in form of price or otherwise, the buyer has particular interest in the thing and the court may grant the forced performance of the contract. The buyer may also require the seller to the defect in the thing be made good within a reasonable time¹⁸.

Making the defect good may be either making the defective part of the thing good or replacing the defective thing as a whole with a non defective¹⁸ one. But before granting this remedy to the buyer, courts must ascertain the fulfillment of the following two conditions¹⁹. Firstly, the sale must relate to a thing which the seller has to make or produce on the specifications given by the buyer ²⁰. Where the thing is the one, which is produced by the seller according to the specifications, made by the buyer, and if the seller didn't comply with the specifications made by the buyer, then the buyer may demand forced performance of the contract ²¹. Here, in my opinion, the buyer may not be required to show particular interest in making good the defect because of the specific nature of the contract. That means as the thing is the one to be produced or made by the seller and he has promised to produce the thing in accordance with the specifications given by the buyer. the express specification made by the buyer by itself shows that the buyer has particular interest in the thing. That is if the buyer had no particular interest in the thing, he wouldn't have entered the seller to make or produce the thing according to his own specifications.

Secondly, even if the seller produces the thing, the seller may not be in a situation where he can make the defect good. Thus, the seller is required to make the defect good only where such defects can be made good. But strictly speaking, one can't say it is impossible for the seller to make the defect good as it is in fact within the reach of the seller to make good the defect in the thing which has been produced by him.

According to Art 2332(1) of the civil code, only the buyer who has regularly given notice of the defect in the thing to the seller, that may require a forced performance of the contract in the case of defect and non conformity. In order to hold the seller liable in his warranty, the buyer must identify the nature of the defect and notify the seller as to the defect or non-conformity which he has come across by the examination of the thing. The background for this is and 2293(1) of the civil code, which states that the buyer who has not notified the seller of the defects or non conformity may not avail himself of defect or non conformity unless the seller admitted their existence. This is a procedural requirement for the buyer in order to require forced performance.

What is more, the buyer should also give notice to the seller within short period of time after he has ascertained the defect and non-conformity that he is going to seek the forced performance of the contract ²³. This is a very special and essential notice as the failure to do it results in the loss of one's right to demand the remedy of forced performance.²⁴

It is not a default notice for the non-performance of the contract but that the buyer intends to require the forced performance of the warranty obligation. The seller should be aware that he is going to be forced to comply with his warranty obligation. Because, even if he is late, he may be able to perform his obligation. If so, there would be no need for the buyer to go court in order to demand the forced performance of the warranty.

The other instance of non-performance which may resort the buyer to remedy of forced performance is delay in delivery ²⁵. The main obligations of the seller are to deliver the thing and transfer ownership²⁶. But some times the seller may breach his obligation to deliver and transfer ownership of the thing sold, and in such cases where the thing has not been regularly delivered, the buyer may demand the forced performance of the contract where it is of particular interest of him²⁷. The law gives remedy of forced performance to the buyer where the seller fails to regularly delivered the thing but the buyer should have particular interest over the thing which is seen in light of Art 2330 of the civil code ²⁸.

Non-delivery by the seller is another instance of non-performance that entitle the buyer to remedy of forced performance ²⁹. It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale ³⁰.

The duty of the seller to deliver the goods is a somewhat ambiguous concept for it covers three entire different possibilities 31

In the first place, there may be a duty to delivery to the buyer goods in which the property his already passed. Here the duty is specific and, subject to the question of payment, it is a duty which will be broken should the seller fail to deliver hose particular goods, if the property has already passed.

In the second place, the seller's duty to delivery may be a duty to procure and supply to the buyer goods in accordance with the contract, but without any particularly goods being designated to which the duty of delivery attaches. Thus, a contract for sale of purely generic goods does in one revise put up on the seller the duty of delivering the goods, but there is no duty to deliver any

particular lot of goods. Therefore, the seller is perfectly free to deliver any particular quantity of goods answering the contract until such a duty arises.

There is a third possibility mid-way between the first two. It may be that the seller is under a personal duty to deliver a particular lot of goods although the property has not yet passed to the buyer. This always happens in case of an agreement to sell specific goods, and clearly the seller cannot resell those goods without being guilty of breach of contract. Even in the sale of unascertained goods it is possible for the seller's duty to deliver to attach a particular lot of goods before the property passes.

Under Art. 2266 of the civil code, it is stated that the seller is under obligation to deliver the thing sold. Art 2273 (1) of the civil code provides the same thing. And failure of the seller to deliver the thing sold entitles the buyer to remedy of specific performance

2.1.2. Specific Performance as a remedy for the seller

When a seller contracts to sell goods he is bargaining for the price³². That is, the principal obligation of the buyer he undertakes is to pay the price expressed in money terms³³. In fact, sale is exchange of things for money³⁴ with respect to the payment of the price in the absence of agreement otherwise, there is simultaneity of performance per to Art. 2278(1) of the civil code that is, the buyer is expected to come with the price at the time when he demands delivery of the goods. But as per art 2310 of the civil code, there is some added dimension, namely that, without prejudice to Art 2278 in the absence of otherwise agreement, the buyer shall not be bound to pay the price until he has had an opportunity to examine the thing. If the buyer fails to pay the price, the seller normally sustains a loss, at least to his expectancy

interest, and if the buyer's failure is not legally justified, it constitutes breach of contract, entitling the seller to some remedy³⁵. If the buyer doesn't effect payment of purchase price, the seller may demand payment unless the sale related to a thing in respect of which a compensatory sale is imposed by custom³⁶. That is the seller can request the court to force the buyer in order to pay the purchase price where there is no compensatory sale over the thing³⁷. The requirement for the seller's succeeding in demanding payment is whether he can effect compensatory sale, can he sell the thing to another buyer? If the seller can effect compensatory sale, he may not avail himself of Art.2333 of the civil code, demanding forced performance.

Damages

When a contract is made, there is always a possibility that one of the parties to it will fail to perform³⁸. If this happens, the defaulting party often must pay the other party "damages" the amount being determined in any a number of ways by law or regulation, by trade practice or custom by provisions and explicit agreement of the parties own device (so called liquidated damages³⁹).

The other available remedy for the creditor is to require damages for the damage caused to him as a result of non-performance of the contract by the debtor⁴⁰. Damages may be required to be paid where the debtor fails to perform the contract either totally, or performed the contract but in part, or improperly, or performed with delay or the creditor refused to accept the performance on the ground of delay⁴¹. question of damages may be arisen in the following three reasons⁴².

1. When the contract is not performed;
2. When contract is invalidated on the ground of lack of required essential elements by law;

3. When damage is caused, but beyond the contractual relationships.

- Contract is considered not performed by one or all of the following reasons⁴³.

When the debtor fails to perform the contract whether totally, in part, in properly or delayed⁴⁴. The fact that contract is not performed by one or all of above mentioned reasons can not be the ground for damages to be awarded unless otherwise the damage exists and the aggrieved party could convince the court about the existence of the damage ⁴⁵. If all these requirements are fulfilled, then the aggrieved party can require damages in order to be put:

1. Into his previous position, which would have existed had the contract not been made⁴⁶,
2. Into the position, which would have existed, had the contract been properly performed ⁴⁷.

Damages may be awarded when contract is invalidated on the ground of lack of required essential elements. This is intended to put the party whose interest may be affected as the result of the invalidation of the contract into his position, which would have existed had the contract been concluded⁴⁸.

The third reason when damages may be awarded is in case where damage is caused, but beyond the contract. One may be responsible for acts performed by him, causing material or moral damage to other party ⁴⁹. This liability is also called extra-contractual liability

The reason why the law awarded damages to the aggrieved party is since it is the objective of law to keep up the relation of parties in balance⁵⁰. In line with the achievement of this objective of the law, in principle the demand of aggrieved creditor must be satisfied⁵¹. In the contract, damages awarded not

to punish the debtor but it is a civil sanction to compensate the aggrieved creditor⁵².

In the common law, damages are considered a basic method of protecting the rights of the creditor and the creditor can always require monetary compensation in non-performance of the contract. But in the continental legal system, damages are put in to the second place and are only awarded in two cases⁵⁴ (1) if payment in kind is impossible and (2) if the creditor lost interest in obtaining such a performance.

Having seen the remedy of specific performance, we shall now turn to consider the other form of contractual remedy available to the seller in case of non-performance on the part of the buyer and available remedy to the buyer in case of non-performance on the part of the seller, where there is a loss caused called Damages. Under the Ethiopian contract law specific performance and cancellation are alternative remedies while damages may be awarded either apart from the other two forms of remedy or concurrently with one of them⁵⁵. Similarly, Art. 2360(1) of the civil code provides that “where the non-performance of one of his obligation by the buyer is detrimental to him, the seller may claim that the damage thus caused be made good by way of damages.”

That is the seller can claim damages as independent remedy where non-performance on the part of the buyer is detrimental to him, sub article (2) of the same provides that the seller can claim damages as additional remedy to cancellation or specified performance where the contract has not been regularly and exactly performed. In the same fashion, even if forced performance and cancellation, may be applied, as the case may be, the buyer

may also require that the remedy of compensation for the damage he has sustained due to cancellation or forced performance.

The buyer as a result of non-performance of one of the obligations of the seller may sustain damage and in that case the buyer may claim that the damage thus caused be made good by way of damages. And according to the spirit of Art. 2360(2) of the civil code the buyer can claim damages in addition to cancellation, where the contract has not been regularly and exactly performed.

CHAPTER TWO

EDN NOTES

1. J. Corbin, CORBIN ON CONTRACTS, 1st ed, pp. 2
2. RICHARD A. POSNER AND FRANCESCO PARISI, Economic Foundations of Private Law, printed and bound in Great Britain by MPG Books Ltd, Bodmin, Cornwall, pp.385
3. Ibid
4. Ibid
5. William R. Anson, principle of the law of contract. 3rd ed. (1919), pp.9
6. John E. Smith, The law of contract, 2nd ed. (1993) pp. 223
7. Civil code of the Empire of Ethiopia, art, 1776, (1960)
8. Melvin A. Eisenberg, contracts, 12th ed pp. 184
9. Supra note 6
10. Supra note 7
11. Ibid
12. Girma Gizaw (Dr), Ethiopian contract Law General Provisions, 1st (2002), pp. 51
13. Id, pp.125
14. Supra note 7, Art. 2282 cum. 2287
15. Barry Nicholas, The French law of contract, 2nd ed. (1992) pp. 47
16. supra note 7
17. Id, Art. 2288 (a)
18. Id. Art. 2332(2)
19. Ibid
20. Ibid
21. Ibid
22. Ibid
23. Id, art 2331 (1)

CHAPTER THREE:-
CANCELLATION AND PRICE REDUCTION AS A REMEDY
FOR BREACH OF SALE CONTRACT

3:1. Cancellation In general

One of the remedies to which the aggrieved party resorts, where the other party fails to perform his obligation fully and adequately to perform it according to the terms of the contract or where there is delay in performance is cancellation of the contract¹. Cancellation of the contract is declared normally through the courts. (Arts. 1784-1785 the civil code.)

As a principle cancellation is not unilateral, therefore.² It is not in fact a right that can be exercised unilaterally. Unilateral cancellation, thus, is an exception that exists when the law or the contract permits.³ The requirement of conditions in granting unilateral cancellation makes it clear that cancellation as a rule, can only be effected through judicial act which is of French origin.⁴

To strengthen this argument, art 1784 of the civil code states that “ a party may move the court to cancel contract where the other party has not or not fully and adequately performed his obligations within the agreed period of time.” In other words, declaration of cancellation as a matter of principle is through the court. This is an application of the principle that no one may be judge in his own case ⁵.

The court is not bound to grant cancellation rather there are guidelines for the use of its discretion in this respect⁶. In deciding whether to cancel a contract or not, court should consider the creditor's and debtor's interest and the requirements of good faith as per art 1785(1) of the civil code. Sub-articles (2) and (3) of art. 1785 provides the starting point for the reasoning leading to the courts granting or disallowing the cancellation of the contract.

Regarding this, George krzeczunowicz said that where no performance of contract is total and irreversible, it is Obvious fundamental , and cancellation must be granted⁶.

As per art 1748 of the civil code, unless exact conformity to the contract has been expressly agreed or is essential to the creditor, the creditor as a result of small insufficiency in quality or quantity may not even refuse performance, so that neither cancellation nor a complementary performance may be required but the creditor may proportionately reduce his own performance. On the other hand, where performance remains possible but is only delayed, the court may, instead of cancelling, the contract on the ground of non-performance, grant the deserving debtor a period of grace unless this is provide against by the parties ⁷.

The issue of cancellation will depend on the determination whether the given breach of the contract is or is not fundamental in which the very essence of the contract be affected by the non-performance and it is reasonable to hold for such reason that the party requiring cancellation of the contract would not have entered in to the contract with out the term which the other party has failed to excute being included ⁹.

CHAPTER TWO

EDN NOTES

1. J. Corbin, CORBIN ON CONTRACTS, 1st ed, pp. 2
2. RICHARD A. POSNER AND FRANCESCO PARISI, Economic Foundations of Private Law, printed and bound in Great Britain by MPG Books Ltd, Bodmin, Cornwall, pp.385
3. Ibid
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14. Supra note 7, Art. 2282 cum. 2287
15. Barry Nicholas, The French law of contract, 2nd ed. (1992) pp. 47
16. supra note 7
17. Id, Art. 2288 (a)
18. Id. Art. 2332(2)
19. Ibid
20. Ibid
21. Ibid
22. Ibid
23. Id, art 2331 (1)

24. Ibid
25. Supranote 7, art. 2329
26. Id, Art 2266
27. Supra note 25
28. Ibid
29. Ibid
30. Supranote 26
31. John D. Calamari & Joseph M. Perillo, The law of contracts, 4th ed. (1998), pp.35
32. M.C. Kuchhal, Mercantile Law, 5th ed. (1999), pp. 16
33. Ibid
34. Id, pp.17
35. John M. Stockton, sales in a nutshell, 1st ed, (1981) pp. 287
36. supra note 7, Art 2333
37. Ibid
38. Supra note 2, pp. 470
39. Ibid
40. Supranote 7, art 1771
41. Supra note 12, pp. 186
42. Ibid
43. Ibid
44. Ibid
45. Ibid
46. Id, pp.188
47. Ibid
48. Ibid
49. Ibid
50. Supra note 12, pp. 187
51. Ibid

52. Ibid

53. Ibid

54. Ibid

55. Supranote 12 Art 1790 (1)

One thing that should be considered is where the court refuses to grant cancellation, this in no way affects the aggrieved party's right to compensation for the shortcomings in the performances of the contract. Upheld by the court (art.1790(1) of the civil code), or reduction of his own performance pursuant to Art. 1748(2) of the civil code where applicable.

Generally, in order for the court to declare cancellation, according to Art. 1785 of the civil code, the breach (non-performance) is to be considered serious in two alternative cases

Firstly, where the broken term is the term to which the parties would seem to attach greater importance or where they would consider to regard the term as fundamental one (Art. 1785 (2)). Secondly, where the consequence that results from the breach affects the very essence of the contract, or where it defeats the very purpose of the aggrieved party in entering into the contract (art. 1785(3) of the civil code).

Parallel to arts 1784-1785 of the civil code, which deal with the judicial cancellation of the contract, arts. 1786-1789 of the civil code deal with the exceptional case where unilateral cancellation of contract, without having to go before a court, by the aggrieved party is authorized by law. In other words, though cancellation of a contract for non-performance generally must be pronounced by the court, there are situations where it is appropriate to give a party the right to declare the cancellation without having to go before a court.

There are four cases where the cancellation of the contract may be declared unilaterally by one of the parties. It is allowed where the parties have expressly agreed,⁹ or the time limit for the performance has expired or the

performance of the obligation has become impossible¹⁰ or that either of the parties has unequivocally refused to carry out his obligation¹¹. Art. 1786 of the civil code talks about unilateral cancellation when the contract permits while the law permits. Under arts. 1787, 1788 and 1789 of the civil code.

Per art , 1787 of the civil code, having given enough time to other party he won't accept performance after a certain specified time, the creditor may cancel the contract unilaterally.

A party may unilaterally declare cancellation of the contract even before the performance becomes due when he realizes that the other party is in an impossible position to perform the contract or where the performance by the other party is hindered or delayed to such an extent that the essence of the contract is affected ¹².

According to Art. 1789 (1) and (3) of the civil code, the information to be given could be oral as long as it is unequivocal, undeniable, without leaving any reasonable doubt that the informer says he will not perform his obligations under the contract . In this case however, default notice is necessary to cancel the contract (art, 1789(2)).

In other words, when the refusing party informs the other party unequivocally that he will not perform his obligations under the contract, the recipient party should put him in default unless the matter falls under sub-art (3) of art 1789 of the civil code. Now, the refusing party, having been given notice, may change his mind and guarantee that he will perform the contract at the agreed time by producing security within 15 days from the notice¹³. Why he changes his mind may be because he is afraid of paying damages to the other

party or also because the circumstances that make him to inform the other party are gone.

For the purpose of canceling a contract unilaterally, default notice is necessary as a rule¹⁴, Exceptionally, however, 4 notice shall not be required and the contract may be cancelled forthwith where the party informs the other party in writing that he will not perform his obligation¹⁵.

Note, finally, that all the situations under arts. 1786-1789 of the civil code are exceptional situations where by a party may cancel a contract unilaterally. Another important point is that even when cancellation is unilateral, giving notice is necessary as a rule. It is only exceptionally when the law or the contract allows that unilateral cancellation may be made without notice.¹⁶

3.1.1. Remedy of cancellation for the seller.

As in the case of general contract, there is remedy of cancellation in case of breach of sale contract. In this contract there are different instances of non performance which entitle the parties (seller or buyer) to remedy of cancellation (Judicial or unilateral). And this topic will deal with those instances that entitle the seller to remedy of cancellation.

The seller may apply to the court to order the cancellation of the contract.¹⁷ One instance of non performance on the part of the buyer which resorts the seller to remedy of cancellation is non payment of the price. We have seen in chapter 2 that non payment of purchase price entitles the seller to claim forced performance.¹⁸ And this act of the buyer also entitles the seller to claim cancellation or to declare cancellation.¹⁹ As stated under Art 2348(1) of the civil code. "the seller may forthwith declare the cancellation of the contract in

case of non payment of purchase price where this right has been expressly given to him by the contract of sale “ That is, if there is any provision in the contract to the effect that the seller can unilaterally cancel the contract where the buyer fails to pay the price, then the seller using his right can do the same. But if there is no such stipulation to this effect, the seller is duty bound to put the buyer in default (give default notice) by fixing reasonable date where the thing relates to a thing which has current price ²⁰

The other instance of non performance which may resort the seller to cancellation is default in taking delivery by the buyer.²¹ It is a duty of the buyer to take delivery and pay for the goods, in exchange for delivery of the goods by the seller.²²

Art 2349 of the civil code states “ where the buyer fails to take delivery of the thing on the condition laid down in the contract, the seller may require the cancellation of the contract, where the failure of the buyer justifies the fear that he will not pay the price or it appears from the circumstance that taking delivery was an essential stipulation of the contract “. That is, the seller may pray to the court for the cancellation of the contract, if the failure of the buyer to take delivery justifies his fear that the buyer will not be in a position to pay the price. I.e. he may get bankrupt for instance or circumstances justify that taking delivery was essential stipulation of the contract.

The other instance of non performance which bless the seller with remedy of cancellation is where the buyer fails to make specifications where the contract of sale is provision of specifications.²³ And in this case, provision of specifications are the duty of the buyer besides payment of price. That is as per Art. 2334 of the civil code the buyer is duty bound to make specifications as to the form, measurements or other details of the thing within a fixed time

in the contract or reasonable period to him “ And if the buyer fails to provide the specifications within the time fixed or reasonable time, as per Art 2333 of the civil code, the seller will do the specifications by himself, and this presupposes a prior business relationship between the two. If the buyer fails to make the specifications and if there is no a prior business relationship between the seller and the buyer, then the seller may declare the cancellation of the contract ²⁴

3.1.2 Remedy of cancellation for the buyer

One of the most important remedies to which the aggrieved party resorts when the other party fails to perform his contractual obligations is cancellation of the contract. To this effect, Art 1784 of the civil code provides that “ a party may move the court to cancel the contract where the other party has not or not fully and adequately performed his obligation within the agreed period of time “ Forced performance being an exceptional remedy cancellation is cheaply available remedy.²⁵

Similarly, Art 2336 of the civil code in sales law repeats the same thing when it refers to Articles 1784-1789 by stating that the buyer may require the court to order cancellation of the contract or may declare the cancellation of the contract in accordance with the provisions of Art. 1789 of the civil code pursuant to this article, therefore, cancellation could be unilateral (by the aggrieved party) or through the medium of the court. Generally, the writer under this topic will deal with instances of non performance on the part of the seller that entitle the buyer to remedy of cancellation (judicial or unilateral) pursuant to Art 2336, therefore, cancellation could be unilateral (by the aggrieved party) or through the medium of the court. Unilateral cancellation is the exceptional remedy provided for the buyer where right to this effect is

reserved in the contract and when the conditions to implement this right are fulfilled. ²⁶

In order to cancel the contract unilaterally, there must be a provision in the contract permitting the parties to unilaterally cancel the contract in case there is delay or failure to perform one's contractual obligations.²⁷

As in the case of general contract, in case of sale contract a contract shall not be cancelled unless there is a breach of fundamental provision of the contract²⁸. The fundamentality of a term may be proved by the fact that had the aggrieved party known of the breach he wouldn't have entered into the contract. Thus, breach of a fundamental term of the contract may include breach of warranty²⁹ because this amounts to breach of law, as under Ethiopian law, warranty is creation of the law than the agreement of parties.

Hence, it follows that, if there is a breach of warranty of the thing sold to the buyer, he is entitled to bring an action for the cancellation of the contract as a whole seeking the avoidance of the sale contract and the return of all or part of purchase price or reduction of the price because of the defects or non conformity in the thing. ³⁰ The defects or non conformity in the thing may be the one, which renders the thing absolutely useless or its usability so inconvenient that the buyer wouldn't have bought had he known of the defect and non conformity thus constituting breach of warranty.³¹

Some times, however, even when there is no defect or non conformity in the thing sold, the buyer may request the cancellation of the contract where the seller declared in good faith to the buyer that the thing sold has some quality at the time of the contract but which is latter on found not to exist ³². This is, however, provided that this quality was the principal motive to induce the

buyer to purchase the thing. The Ethiopian legal system also under Art. 2344(1) of the civil code points out that the contract may be cancelled where the thing is affected by a defect against which the seller warranted the buyer. The buyer is not entitled to the cancellation of the contract for all and any kind of defect appearing in the thing but only for those warrantable defects against which the seller has warranted the buyer ³³

Non warrantable defects are defects of small importance where the defects doesn't affect the utility or usability of the thing such that, the thing could be put to use notwithstanding the defect³⁴ Thus, the contract may not be cancelled where the defect is of small importance and it appears that the buyer would have bought the thing had he known of the defects. If it is established that the buyer wouldn't have refused to buy the thing even knowing the defect in the thing, then the defect is of small importance and wouldn't result in the cancellation of the contract.

Where the sale relates to sale of several countable things and only some of them are found to be defective, the contract may be cancelled only with regard to such defective things.³⁴ The rule in such a case is partial cancellation of the contract with regard to the defective part of things. However, the contract may also be cancelled totally depending on the nature of the things sold where the defective thing can't be separated from those which are free from defects unless it be with considerable inconvenience to the buyer or the seller³⁵ If the cancellation relates to that part of the contract with regard to the principal thing it shall also extend to the accessories even if they have bought under a separate sale contracts. ³⁶

This is because if the main thing is to be returned to the seller because of cancellation, the accessories would bring no use to the buyer.

According to Art 1747 (1) of the civil code, in a sale relating to fungible things, unless there is a contrary agreement in the contract, the seller may choose as to the thing he has to deliver.

If there is an express agreement as to what to be delivered by the seller, the seller has to comply with the agreement. But in the absence of such agreement, the seller may deliver a thing he wanted. Even if the choice is given to the seller, however, there is guideline called average quality which shouldn't be violated by the seller .³⁷

The seller may not deliver a thing which is below " average quality". Average quality is a question of defect, of it has to be understood in the light so Art. 2289 of the civil code. If the thing delivered by the seller conforms to the average quality of the thing, the buyer can't refuse it because of minor defects.³⁸ The buyer therefore, may not refuse fungible things simply on the ground that the quality offered to him doesn't exactly conform to the contract. But the buyer may require the partial cancellation of the contract per to Art. 2345(1) of the civil code, where part of the thing delivered to him is below the required average quality.

Also, article 2343(1) of the civil code allows the buyer to cancel or require the cancellation of the contract in cases of non conformity where part only of the thing sold is delivered to the buyer or part of the thing doesn't conform to the contract. This is one situation of warrantable non conformity, because Art. 2288(2) of the civil code states that the thing sold shall not be deemed to conform to the contract where the seller delivered to the buyer part only of the thing sold or a greater or lesser quantity than agreed in the contract.

The other case of warrantable non conformity in which the buyer is entitled to cancel or require the cancellation of the contract is where the thing sold is wholly delivered to the buyer but part only conforms to the contract and part not.³⁹

In both cases, the rule is partial cancellation of the contract because the rule says that in such cases the buyer may not cancel the contract for the whole. What is allowed is partial cancellation of the contract for the part not delivered and for the part not in conformity with the contract. The buyer may cancel or require the cancellation of the contract for part of the thing or quantity of the thing not delivered. In cases where part of the thing sold only conforms to the contract too, the law is interested in the partial cancellation of the contract only for part which doesn't conform to the contract.⁴⁰

Total cancellation in cases of non conformity is permitted only by way of exception. It comes into operation only under two circumstances⁴², Firstly, when it is very essential to the buyer to cancel the contract totally;⁴³ and secondly, where the date fixed in the contract for delivery of the totality of the thing sold constituted a compulsory date for the delivery of the whole thing ⁴⁴.

Essentiality in the total cancellation of the contract exists where it is proved that the buyer wouldn't have entered into the contract had he known how the seller would excute the contract.⁴⁵

Thus, partial delivery leads to the total cancellation of the contract where it is shown that the buyer wouldn't have entered into the contract had he known that the seller is going to deliver part only of the thing sold. Like wise, partial non conformity to the contract results in the total cancellation of the contract

where the buyer proves that he wouldn't have contracted within the seller had he known that there would be non conformity of thing sold with the contract.

The other situation where total cancellation of the contract is allowed in case of partial delivery is where the date fixed for delivery of the thing sold constitutes a compulsory date for the delivery of the whole thing but the seller delivered only part of the thing on that date.⁴⁶ Even if the seller delivered the undelivered part subsequently, the contract can be cancelled totally including the delivered part where the date agreed upon for delivery is a compulsory date for delivery of the whole.⁴⁷ So, what matters is whether the compulsory date fixed is for delivery of the whole or part only of the thing sold.

As regards to dispossession pursuant to Art. 2281 and 2282 of the civil code the seller shall transfer to the buyer an unassailable right over the thing sold and warrant the buyer against any total or partial dispossession which he might suffer in consequence of third parties exercising their right at the time of the contract. This is a law emanating warranty not contractual warranty.⁴⁸ Therefore, the seller is duty bound by law to warrant the buyer against dispossession by third parties who have right over the thing sold. By virtue of Art. 2342(1) of the civil code, if the buyer is totally dispossessed from the thing he bought which the seller has warranted him against dispossession, he may cancel the contract as of right. This article talks about warrantable dispossession and presupposes dispossession made through the order of the court as a result of a third party exercising his right over the thing. In such situation the buyer may cancel the contract unilaterally without giving notice to the seller.⁴⁹ The only remedy the buyer may resort to in case of dispossession is to cancel the contract and claim compensation for any damage he has sustained. The buyer may not reclaim the thing from third parties who dispossessed him i.e. he can't require the forced performance of the contract.

In case the buyer is partially ousted from the thing the contract may or may not be cancelled depending on the will of the buyer.⁵⁰ The contract may not be cancelled where the part dispossessed from the buyer is of small importance and it appears that the buyer would have bought the thing had he known that he would be dispossessed of such part⁵¹. The buyer may be able to put the thing to use irrespective of the dispossessed part.

Pursuant to Art. 2341(1) of the civil code, the buyer may also cancel the contract where as a result of a defect affecting his title the seller has not transferred the whole ownership of the thing to the buyer. This Art. refers to a situation where the ownership of the thing is not transferred to the buyer because of third parties who have encumbrance over it. Here, possession is not transferred to the buyer and hence dispossession is not yet materialized. Even in such situation, in light of this article the buyer may require the cancellation of the contract for fear of future dispossession. Because he will not be able to exercise unassailable right of ownership over the thing due to third parties who have right over the thing.

The contract may however, not be cancelled where the buyer on buying the thing knew of the encumbrance over the thing⁵¹ That means, awareness on the part of the buyer lifts the liability from the seller. In such a case the buyer is going to bear the risk of dispossession himself. Also, the contract may not be cancelled where the right of third parties with which the thing sold is encumbered is of small importance and it appears that the buyer would have bought the thing even knowing the encumbrances over it.⁵²

3.2. price Reduction

The other remedy which is available to the buyer in case of non-performance on part of the seller is price reduction.⁵³ As rule , the primary obligation of the seller is to deliver the thing sold to the buyer,⁵⁴ That is the seller has to deliver the whole quantity of the thing they agreed in the contract. But as a matter of fact the seller may fail to do so i.e. he may deliver part of the thing only or the delivery may not conform to the contract, such cases as we have seen earlier the buyer may not cancel the contract for the whole unless it appears he wouldn't have entered in to the contract, had he known how it would be excuted. And where the buyer is not entitled to cancel or require the cancellation of the contract, he may confine himself to paying to price proportionate to the value of such part as has been duly delivered to him⁵⁵. That is which the seller delivers part only of the thing or a thing when doesn't conform to the contract to the buyer, then the buyer can accept [take delivery] of those thing which conforms to the contract or those part of the thing delivered and proportionately reduce the price he will pay only to the thing delivered to him properly.⁵⁶

3.3 The adequacy of contractual remedies available under Ethiopian contract law.

So far we have seen various contractual remedies by which the law blessed the aggrieved creditor in cases of non-perforamcne, particularly by giving special focus to sale contract. And since it is not all kinds of non performance that entitle the aggrieved creditor to those remedies [damages , cancellation, Specific Performance, and price reduction] the writer

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has also tried to see those instances of non performance which entitle the aggrieved creditor to those remedies.

In the present topic what the writer will do is, to evaluate the adequacy of these remedies. That is, the guiding principle being "provisions of contract lawfully formed shall bind parties as if they were law" do the remedies available guarantee this guiding principle? In this topic, the writer is highly interested to address the following issues.

- As the main goal of contract remedies is to place the disappointed promisee in as good position as he would have enjoyed had his promise been performed, are the available remedies adequate to achieve this goal of contract remedies?
- The breach of contract, practically, always causes mental vexation, feeling of disappointment and contract frustration in the aggrieved creditor. And are these costs recoverable under Ethiopian contract law or do the remedies available cover such effects of breach?
- In Ethiopian contract law is the remedy of damages and cancellation [unilateral or judicial] cheaply available. That is specific performance is not routinely available, but specific performance being the most accurate method of achieving the compensation goal of contract remedies because it gives the promisee a precise performance that he purchased, should this remedy have been routinely available.
- What is the position of courts towards those remedies?
- Whether the legal requirements that the aggrieved creditor shall meet are fair or not. Particularly with regard to forced performance.

All the above issues will be addressed by looking in to remedies available in Ethiopia in light of those remedies available in other countries. And various justification forwarded to restrict the expanding of remedy of specific performance and the counter justification.

It is nice to begin from specific performance, the current law regarding specific performance is courts grant specific performance when they perceive that damages will be inadequate compensation ⁵⁷. Specific performance is deemed an extraordinary remedy, awarded at courts discretion.⁵⁸

It must be remembered that specific performance is not a matter of right, even when the plaintiff's evidence establish a contract at law and sufficient for recovery of damages, ordering specific performance (enforcement) of the contract is a matter with in the sound judicial discretion of the courts⁵⁹. The plaintiff was required to show the goodfaith and equities of its own position and the trial chancellor, in weighing the equities, was entitled to consider whether a decree of specific performance would work an unconscionable advantage to the planted or would result in injustice ⁶⁰. The same is true in Ethiopia contract law that is it is with in the discretion of counts to grant the aggrieved party a remedy of forced performance.⁶¹ That is unlike other remedies [cancellation and damages] in case of specific performance the aggrieved creditor can't claim for it as of right by his election, rather it is through the medium of the court that he would be granted for it provided that he proves to the satisfaction of the court that it wouldn't affect the personal liberty of the debtor and it is of his special interest.⁶²

Promisors can raise a number of defenses against specific performance that are not available against a damages award, like inadequacy of consideration,

lack of security for the promisee's performance, the promisor's unilateral mistake and the difficulty the court would in supervising a specific performance decree ⁶³. And it is quite obvious that these defenses serve to restrict further the availability of the specific performance remedy.

Further, courts currently refuse to enforce contracts providing for remedies different from those that they would grant "liquidated damage clause " with sufficient high damage provision would in effect guarantee performance by the promisor because the costs to him of breach would always exceed the costs of performance.⁶⁴ However, courts will not enforce such clause usually, liquidated damage clauses are enforced only if they reflect a reasonable forecast of actual damages the damages courts would grant in the contract ⁶⁵. In addition, courts seldom enforce contract clauses that provide for specific performance in the event of breach ⁶⁶.

Specific performance is the most accurate method of achieving the compensation goal of contract remedies because it gives the promisee a precise performance that he purchased ⁶⁷.

The natural question then is, why specific performance is not routinely available. There might be three explanations of the law's restrictions on the specific performance ⁶⁸. First, the law's commitment to the compensation goal may be less than complete; restricting specific performance may reflect an inarticulate reluctance to Pursue the compensation goal fully.⁶⁹ That is, if specific performance is cheaply available by the election of the aggrieved creditor, it would make him reluctant or careless to exhaust other remedies. He may stick on specific performance rather than pursuing the other remedies. Second, damages may generally be fully compensatory. In that event expanding the availability of specific performance would create

opportunities for promisee to exploit promisors by threatening to compel, or actually compelling, performance, without furthering compensation goal.⁷⁰

The third explanation is that concerns of efficiency or liberty may justify restricting specific performance might generate higher transaction costs than the damages remedy, or interfere more with the liberty interest of promisors.⁷¹

With respect to the second justification, current doctrine authorizes specific performance when court can't calculate compensatory damages with even a rough degree of accuracy ⁷². If the class of cases in which there are difficulties in computing damages corresponds closely to the class of cases in which specific performance is now granted, expanding the availability of specific performance is obviously unnecessary.⁷³ Further, such an expansion would create opportunities for promisees to exploit promises. The class of cases in which damage awards fail to compensate promisees adequately is, however, broader than the class of cases in which specific performance is now granted⁷⁴.

Thus, the compensation goal supports removing rather than retaining present restrictions on the availability of specific performance.

It is useful to begin by examining the typical case for granting specific performance under current law, the case of unique goods ⁷⁵. When a promisor breaches and the promisee can make a transaction that substitutes for the performance the promisor failed to render, the promise will be fully compensated if he receives the additional amount necessary to purchase the substitute plus the costs of making a second transaction. In some cases however, such as those involving works of art, courts can't identify which transaction the promisee would regard as a substitute because that

information is often in the exclusive possession of the promisee⁷⁶. Moreover, it is difficult for a court to assess the accuracy of a promisee's claim⁷⁷. For example, if the promisee breaches a contract to sell a rare emerald, the promisee may claim that only the Hope Diamond would give him equal satisfaction, and thus may sue for the price difference between the emerald and the Diamond. It would be difficult for a court to know whether this claim is true. If the court seeks to award money damages, it has three choices.⁷⁸ granting the price differential which may over compensate the promisee, granting the dollar value of the promisee's forgone satisfaction as estimated by the court, which may; over compensator or under compensate; or granting restitution any of sums paid which under compensate the promisee.

The promisee is fully compensated without risk of over compensation or under compensation if the remedy of specific performance is available to him and its use encouraged by the doctrine that damages must be foreseeable and certain⁷⁹.

If specific performance is the appropriate remedy in such cases, there are three reasons why, it should be routinely available⁸⁰. The first reason is that in many cases damages actually are under compensation. Although promisees are entitled to incidental damages, such damages are difficult to monetize. They consist primarily of the costs of finding and making a second deal, which generally involves the expenditure of time rather than cash, attaching a dollar value to such opportunity costs is quite difficult. Breach can also cause frustration and anger, especially in a consumer context, but these costs also are not recoverable(pp. 276).

Substitution damages, the court's estimate of the amount the promisee needs to purchase an adequate substitute, also may be inaccurate in many cases less

dramatic than the emerald hypothetical discussed above. This is largely because of product differentiation and early obsolescence. As product differentiation becomes more common, the supply of products that will substitute precisely for the promisor's performance is reduced ⁸².

In addition, problems of prediction often make it difficult to put a promise in the position where he would have been and his promisor performed⁸³. If a breach by a contractor would significantly delay or prevent completion of a construction project and the project differs in important respects from other projects, for example, a department store in a different location than previous stores courts may be reluctant to award "speculative" lost profits attributable to the breach.⁸⁴

Second, promisees have economic incentives to sue for damages when damages are likely to be fully compensatory.⁸⁵

Abreaching promisor is reluctant to perform and may be hostile.⁸⁶ This makes specific performance an unattractive remedy in cases in which the promisor's performance is complex, because the promisor is more likely to render a defective performance when that performance is coerced, and the defectiveness of complex performance is difficult to establish in court.⁸⁷ Further, when the promisor's performance must be rendered overtime, as in construction or requirements contracts, it is costly for the promisee to monitor a reluctant promisor's conduct⁸⁸. If the damage remedy is compensatory, the promisee would prefer it to incurring these monitoring costs. Finally, given the time to resolve law suits, promisees would commonly prefer to make substitute transactions promptly and sue later for damages rather than hold their affairs in suspension while awaiting specific performance. The very fact

that a promisee requests specific performance thus implies that damages are inadequate remedy.

The third reason why courts should permit promisees to elect routinely the remedy of specific performance is that promisees possess better information than courts as to both the adequacy of damages and the difficulties of coercing performance.⁸⁹ Promisees know better than courts whether the damages a court is likely to award would be adequate because promisees are more familiar with the costs that breach imposes on them. In addition, promisees generally know more about their promisors than do courts; thus they are in a better position to predict whether specific performance decree will induce their promisors to render satisfactory performance.

In sum, restrictions on the availability of specific performance can not be justified on the basis that damage awards are usually compensatory.⁹⁰ On the contrary, compensation goal implies that specific performance should be cheaply available. This is because damage awards actually are under compensatory in more cases than is commonly supposed.⁹¹ The fact of a specific performance request itself good evidence that damages would be inadequate;⁹² and courts should delegate to promisees the decision of which remedy best satisfies the compensation goal further, expanding the availability of specific performance would not result in greater exploitation of promisors.⁹³

3.3.1. Specific performance and efficiency

Before examining in detail the efficiency justification that could be given for restricting specific performance; it will be useful to relate these justifications to the possible bases of compensation goal. First, suppose that the goal rests

on utilitarian or wealth maximization grounds, that is on assumption that compensating disappointed promisees fully is less costly than not compensating them fully.⁹⁴ If the broader availability of specific performance would generate transaction cost that exceeds the costs of under compensation the specific performance remedy would avoid, then current restriction on specific performance would be justified.⁹⁵ On the other hand, if the compensation goal rests on a moral notion that promises should be kept, that contract remedies should effectuate the state of affairs – performance, that the promisor has a duty to bring about and that the promisee has a right to have brought about, then specific performance is a preferable remedy to damages even though it might generate higher costs.⁹⁶ These costs would be the price of achieving the moral goal of contract remedies.⁹⁷ Under this theory, the promisee's right to an actual performance should be overridden only if the costs of its exercise would be so excessive as to constitute an interference with the rights of other persons⁹⁸. Both possible bases of the compensation goal thus would support the routine availability of specific performance unless specific performance is more costly remedy than damages.⁹⁹ There are two principal ways in which efficiency might suffer as a result of expanding specific performance¹⁰⁰. First, many parties might prefer to have the specific performance remedy available only in those cases in which the law currently grants it.¹⁰¹ If the remedy's availability were greatly expanded, these parties would negotiate contract provisions restricting its use.¹⁰² Legal limitation on the availability of specific performance save these transition costs. Professor Anthony Kronman has argued that limiting specific performance is justified precisely because it avoids such 'Pre-breach' negotiation¹⁰³. Second if specific performance were cheaply available, promisors who wanted to breach would often be compelled to bribe promisees to release them from their obligations.¹⁰⁴

The negotiations required might be more complex and costly than the post breach negotiations that occur when breaching promisors have merely to pay promisees their damages.¹⁰⁵

“intention justification” theories for restricting specific performance argue that the class of cases in which the parties now can get the remedy, and the class of cases in which the parties would want the remedy to be available are coextensive¹⁰⁶. There are two difficulties with this position¹⁰⁷. First there is no reason to assume that the parties’ preferences are congruent with current law.¹⁰⁸ Second, it is excessively difficult to drive from parties’ preferences general legal rules respecting when either remedy should be used.¹⁰⁹

Both weaknesses are illustrated through an analysis of the most sophisticated intention justification theory, that of professor Kronman.¹¹⁰ Kronman classifies as “unique” those objects for which courts would have great difficulty in identifying substitutes¹¹¹. Courts today generally limit specific performance to such cases.¹¹² Professor Kronman argues that this limitation is consistent with the parties’ intention; if they were to contract as to remedy in the absence of a general rule, they would create a specific performance remedy only for sales of ‘unique’ goods.¹¹³ Kronman’s argument starts from the premise that the “cost of a specific performance provision to the promisor will be determined, in part, by his own estimate of the likelihood that he will want to breach the contract” . But contrary to this intention justification theory, there is no single factor such as the uniqueness of the performance will determine the parties’ preferences as to remedy in all cases, for the parties’ preferences are context dependent.¹¹⁴

Further analysis would probably suggest additional discrepancies between the remedies the parties desire in specific situations and those the law now

provides. Therefore, because it has not been established that restricting specific performance minimizes transaction cost of negotiating remedies and tailoring remedies to the parties preference would be so costly administratively, intention justification theories should be abandoned as guides to remedy availability. Rather, specific performance should be made generally available on the ground that the compensation goal is not met adequately by making damages the sole available remedy in many cases.¹¹⁵

3.3.2 Efficiency gains from the routine availability of specific performance.

The analysis thus far suggests that making specific performance widely available at the election of the promisee would not result in more costly pre or post breach negotiations than the damage remedy does at present ¹¹⁶ Further expanding the availability of specific performance would produce certain efficiency gains like it would minimize the inefficiencies of under compensation, reduce the need for liquidated damage clause, minimize strategic behavior, and save the costs of litigating complex damage issues.¹¹⁷

First, if only a damage remedy is available promisors may sometimes breach when their gains from breach exceeds the damages a court will assess, through not the full costs breach imposes on the promisees.¹¹⁸

Second, under current law, parties have an incentive to create a contractual specific performance remedy in cases in which specific performance is now prohibited or its availability is uncertain by negotiating liquidated damage clause... ¹¹⁹ This is because these clauses perform the same function as specific performance ensuring adequate compensation or performance when damage rules provide neither. If specific performance were routinely available,

much of the costs to the parties of negotiating liquidated damage clauses would be saved ¹²⁰.

Third, commentators have argued that liquidated damage clause that require relatively high pay out would create incentives for the promisee to breach when changed circumstances cause the promisee to prefer the payout to performance.¹²¹

Generally the compensation goal of contract law can be achieved by requiring the promisor to pay damages or by requiring the promisor to render the promised performance.¹²² Under current law, a promisee is entitled to a damage award as of right but the court retains discretion to decide whether specific performance should be granted.¹²³ Because specific performance is a superior method for achieving the compensation goal, promises should be able to obtain specific performance on request.¹²⁴ An extended specific performance remedy would not generate greater transaction costs than the damage remedy involves, nor would its increased use interfere unduly with the liberty interests of promisor.¹²⁵ Making specific performance freely available also would eliminate the uncertainty costs of planning and litigation created by the difficulty of predicting whether the remedy will be available.¹²⁶ In addition, this reform would reduce the negotiation costs incurred by parties in attempting to create forms of contractual specific performance such as liquidated damage clauses.

In Ethiopian legal system, remedy of specific performance is exception.¹²⁷ That is, unlike remedy of damages specific performance is not cheaply available and there are stringent requirement that the aggrieved party is required to met, for instance, as provided under. Article 2329 of the civil code, the creditor so as to demand remedy of specific performance he has to show

to the satisfaction of the court that performance of the contract is of a particular interest to him. Further the buyer may not demand the forced performance of the contract where the sale relates to a thing in respect of which a purchase in replacement conforms to commercial practice or such purchase can be effected by him without inconvenience or considerable expense.¹²⁸ The following case between W/ro Shewanesh Assefa Vs Ato Mulunesh Amare may illustrate the above idea.¹²⁹

In this case the plaintiff, plaintiff, on sale contract concluded on August 9, 1988 EC bought a Taxi from the defendant (seller) for \$6,000 Eth. Birr. On the very date of the contract the plaintiff paid Birr. 5,000 out of the purchase price and took possession of the car on the same date.

The plaintiff in her allegation stated that she has caused the Taxi-cab to be examined after delivery and found it to be defective and that it doesn't serve for the purpose for which it was bought. She contended that she has notified this fact to the defendant and required him to either return to her the money she has paid in the form of price or put right the defects in the car and deliver it to her. But, she said that the defendant refused to make good the defect in the Taxi nor to refund her the money she paid.

The plaintiff now sued the defendant to either put right the defects in the Taxi or refund her the money she paid for the price. The defendant however, in his response replied that he has not promised under the terms of their contract to make good the defects in the car and deliver it to the plaintiff. He said he delivered the car to the plaintiff as it was.

The court after analyzing the following two issues, reached at the conclusion that the sale contract between the two parties shall be cancelled and the

defendant should refund the money paid by the plaintiff together with its interest and take back the Taxi from the plaintiff.

(1) Is the defendant (seller) legally bound to guarantee to the plaintiff (buyer) that the taxi he sold is not affected by defects and serves the purpose for which it was bought or not?

2. Should The Contract Be Performed Or Cancelled?

Concerning the first issue, the court analyzed it in light of Art. 2287 and 2289(1) of the civil code. The court held that pursuant to Art. 2287 of the civil code, the seller shall guarantee to the buyer that the thing sold is not affected by defects. And per. Art. 2289,(1) of the code, the warranty shall become effective where the thing doesn't possess the quality required for its normal use or commercial exploitation.

In the case at hand, the court said, it is clear that the plaintiff bought the Taxi for commercial exploitation and it is also ascertained by witness to be so witnesses have testified also that the Taxi was not in a working condition. And the defendant on his part didn't prove to the satisfaction of the court that the taxi can serve the purpose for which it was bought. Therefore, the court held that, even if the defendant did not promise in the contract to put right the defects in the car, this is an algal duty and hence the defendant is duty bound by law to warrant to the plaintiff that the Taxi is not affected by defects and serves the commercial purpose for which it was bought.

The court analyze the second issue in the light of Arts. 2330 and 2344 of the civil code. The court held that in accordance with Art. 2330 of the civil code, the buyer may not demand the forced performance of the contract where the

sale relates to a thing in respect of which a purchase in replacement conforms to commercial proactive or such purchase can be effected by him without inconvenience or considerable expense. In the case under discussion, the courts held that the plaintiff can buy another Taxi in replacement for the former one. On the other hand, the plaintiff did not prove to the satisfaction of the court that she can't buy another Taxi without inconvenience or considerable expenses. Therefore, the court reject her claim that the defendant should make good the defects in the car and deliver it to her.

On the issue of cancellation the court held that pursuant to art. 2344 (1) of the civil code, the contract may be cancelled where the thing is affected by a defect against which the seller warranted the buyer. In the present case, it is proved that he car sold to the plaintiff is affected by defects and can't sarve the commercial purpose for which it was bought. Also, it is proved that the defendant is duty bound by law to guarantee to the plaintiff that the car he sold is not affected by defects and can serve the purpose for which it was bought. Therefore, the court held that the contract between the two parties should be cancelled for the above mentioned reasons.

In the above the plaintiff was asking the court to grant her either specific performance or cancellation of the contract. But the court held that the contract between the two parties should be cancelled for the reasons it mentioned above. It denied here specific performance by analyzing her question of specific performance insight of Article 2330 and 2344 of the civil code. In accordance with Art. 2330 of the civil code, the buyer may not demand the forced performance of the contract where the sale relates to a thing in respect of which purchase interlacement is possible or such purchase can be effected by him without inconvenience or considerable expense. And in the case at hand the plaintiff can buy another taxi in replacement for the

former one. On the other hand, the plaintiff did not prove to the satisfaction of the court that she can't buy another Taxi with out inconvenience or considerable expenses. Here the decision the court give is correct, what the writer would like to comment is on the stringent requirement which the law puts so as to give remedy of specific performance, that is the duty to show to the satisfaction of the court that purchase in replacement is to possible or possible with inconvenience or considerable expense. As to the understanding of the writer, these stringent requirements shall not be there so as to demand specific performance because it is specific performance which adequately achieves the compensation goal of contract remedies and that makes the guiding principle under Art. 1731 (!) of the civil code effective and practical. This being the case, to provide such stringent requirements would not be accurate.

So far we have seen various justifications for restricting the expanding of the availability of remedy of specific performance. We have seen those justification and their draw backs. And, finally the writer reached at the conclusion that since the expanding of the availability of remedy of specific performance will not have out weighting draw backs than the remedy of damages has, and to achieve the compensation goal of contract remedies i.e to put the aggrieved creditor in the position that he would have had the promisor performed, it is specific performance that shall be cheaply available.

The other important question to be answered is are the available remedies under Ethiopian contract law fully compensatory? In most actions for breach of contract, the damages recoverable are restricted to compensation for pecuniary harm.¹²⁹ This harm may be in the form of gains prevented by the breach or in the form of loses suffered.¹³⁰

The breach of a contract, practically, always causes mental vexation, feeling of disappointment and contract frustration in the plaintiff, but he seldom thinks of asking for a money payment there of because it is believed that an equivalent pecuniary satisfaction for his pecuniary injury will sufficiently restore the plaintiff's satisfaction and as a result his intervening vexation, is disregarded.¹³¹

In common law countries so as to avoid contract frustration and disappointment and intervening vexation, there is a concept of mental suffering damages.¹³²

Claims for damages for mental pain and suffering have caused much conflict and difference of opinion, both in the field of tort and in the field of contract.¹³³ In many cases therefore, it is not possible to determine whether the theory of the case held by either the plaintiff or the court was that the action was for a tort or for a breach of contract, or for both at once.¹³⁴ It can't be said that there is a clear line of distinction between tort and contract, with respect to damages for mental suffering.¹³⁵ A large number of the cases in which such damages are asked are cases against carriers, telegraph companies, and innkeepers – all of whom are bound by certain duties that are independent of contract, but who usually have also made a contract for the performance of a duty.¹³⁶

The most common sorts of contracts for breach of which damages have been awarded as compensation for mental suffering have been engagement to marry, contract of carriers and innkeepers with passengers and quests, and contracts for the delivery of death messages.¹³⁷ This enumeration is not to be understood to be complete or exhaustive; but these are all cases in which

personal feelings are most deeply involved and which mental suffering is lively to be most poignant.¹³⁸

Is there a concept of damages of mental suffering under Ethiopian contract law? Pecuniary deprivation may reduce one to poverty and bankruptcy, and the humiliation and mental discontent may be very great, but thus far, under Ethiopian contract law damages are not awarded for such humiliation and discomfort, that is there is no concept of damages of mental suffering. So, how could we say that the remedies available are fully compensatory?

When we see damages in Ethiopian law, the damage provisions in Ethiopian civil code are limited provisions,¹³⁹ since all provisions are about the damage caused by non-performance of the contracts.

Non-performance of contracts may result from either when one party fails to carry out his obligations; totally, in part, properly or according to the time fixed.¹⁴⁰ In all cases there is non-performance of the contracts. Where a party fails to carry out his obligations by one or all reasons mentioned above, then the other party, may according to the circumstances of the case require; forced performance of the contract (see Articles 1776 – 1783 of civil code), or the cancellation of the contract by the court (see Articles 1784 – 1785 of the civil code), or cancellation by one party (see Articles 1786 – 1789 of the civil code).

The breach of contract practically always causes mental vexation and feelings of disappointment in the aggrieved party, but he seldom thinks of asking for a money payment there of.¹⁴¹ It is believed that an equivalent pecuniary satisfaction for his pecuniary injury will sufficiently restore the creditor's satisfaction, and his intervening vexation is disregarded.¹⁴² And as

we have seen earlier Anglo – American legal system allow compensation for moral damage when the breach of contract entitled or brought about a mental vexation of the creditor or disappointment ¹⁴³. But when we come to the Ethiopian legal system, in principle, in the breach of contract, damages are awarded only for the material damage.¹⁴⁴ But non-material compensation is possible only for tort. And Art 2105(2) of the civil code provides that “Unless otherwise expressly provided by law, moral harm may not be made good by way of damages. That is even in case of tort, there will not be moral damage unless the law so provided, and the compensation for moral injury may in no case exceed one thousand Ethiopian birr. Generally in Ethiopian contract law there is no provision which awards the aggrieved party mental suffering damages. But we can have sale transaction in which personal feelings are most deeply involved and in which mental suffering is likely to be most poignant.

As provided under Art. 2270(2) of the civil code the subject of sale may relate to a future thing which the seller undertakes to make for delivery to the buyer. That is sale contract may exist on the thing which is non-existent at the time of the conclusion of the contract. Accordingly to the bride conclude sale contract with the baker so that the seller undertakes to deliver a wedding cake. But on that date (wedding date) the seller (baker) fails to deliver the cake, and this is a clear case of non-performance because under Art. 2266 and 2273 (1) of the civil code it is provided that the seller is under duty to deliver the thing sold in accordance with the provisions of the contract. In this case the bride has sustained pecuniary harm. Besides, this act of the seller causes on her mental vexation and disappointment. And for the pecuniary harm the law blessed her with remedy of damage. But since there is no concept of mental suffering damages in Ethiopian legal system her mental vexation and disappointment is disregarded.

Chapter Three

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Conclusions and Recommendations

The act of entering in to contract is a prior appreciation and acceptance of the relationship's out comes which result form the interaction. Under our law, where freedom of contract is the guiding principle, one may or may not enter in to contractual obligation. It goes without saying contract is a legally enforceable agreement, once entered that transaction, the way out is limited; the obligation is to be governed by the mandatory provisions of the law and the terms of the contract; and as the definition puts, it is enforceable agreement before the court of law.

So far we have seen remedies available under Ethiopian contract law for the aggrieved party in case of breach of contract, sale contract in particular. Since it is not all instance of non-performance the entitle the aggrieved creditor to those contractual remedies cancellation, damages, specific performance and price reduction, we have seen those instances of non-performance that entitle the creditor to those contract remedies. Legal requirements which the aggrieved party is required to met so as to demand those remedies are also dealt in the work. Finally the writer has tried to evaluate the adequacy of those remedies available under our contract law. Even if, the guiding principle as found in Article 1731 (1) of the civil code being " provisions of contract lawfully formed shall bind parties as if it is a law " the remedies available don't seem to go with the guiding principle.

That is if the provisions of contract lawfully formed bind parties as if they were law, it should have specific performance been cheaply available remedy. Because the compensation goal of contract remedies is putting the injured party as good a position as performance would have given him or that he would have had the promisor performed. Among the remedies available to the

promisee, it is specific performance that will accurately achieve the purpose of contract remedies, because it gives the promisee a precise performance that he purchased. But when we see the situation under our law, unlike remedies of damages and cancellation, specific performance is an exception (not cheaply available) and it is the stringent requirements attached to it and the fact that it is within the discretion of the court make it exceptional. Here the law on the one hand asserts that provisions of contract lawfully formed shall bind parties as if they are laws. Surprisingly enough, on the other hand it makes the remedy of specific performance which would make the guiding principle which is found under Art. 1731(1) effective, exception.

Law puts stringent requirements so as to demand specific performance and it is in effect depriving the strength (effectiveness) of what is provided under Art. 1731 (1).

Besides, in Ethiopian legal system, in the contract, damages awarded not to punish the debtor, but it is a civil sanction to compensate the creditor. That is damages have no punishing purpose. There can be no doubt that the general purpose underlying the law of damages they are given for breach of contract is to compensate the aggrieved creditor. This is true in whatever way we may measure the amount of damages to be recovered. So that the remedies of damages in breach of contract are not so severe upon the wrongdoers (the debtor). And this in one way or another way opens the opportunities for potential wrongdoers to act carelessly, maliciously or recklessly towards their creditor to discharge their obligations. And this in effect reduces the effectiveness of, the binding effect of contract upon parties as if it is a law. Generally, from the indications above the writer reaches the conclusion that, even if Art. 1731 (1) of the civil code says 'provisions of contract are a law between parties' contract under Ethiopian contract law is not really binding

as if it is a law and the remedies available under our contract law do not guarantee to say contract has binding effect on parties as if it is a law.

In most actions for breach of contract, the damages recoverable are restricted to compensation of pecuniary harm. But the breach of contract practically always causes mental vexation and feelings of disappointment in the aggrieved creditor. In Ethiopia legal system in the breach of contract, damages are awarded only for the material damage, and non-materials damages (compensation) is possible only for tort. That is even if we have sorts of sale transaction (contracts) in which personal feelings are most deeply involved and the breach of which causes mental vexation and disappointment, there is no damages for such vexation and disappointment and our contract law disregards these things in compensating the creditor. In this point the writer conclude that the remedies available are not fully compensatory.

Finally, provisions of contract law fully formed to have binding effect on parties as if they were laws, and the remedies available to be fully compensatory, the writer would like to recommend:

- Specific performance shall be routinely available remedy by the election of the aggrieved party.
- The concept of punitive damage shall be adopted in the Ethiopian legal system.
- Ethiopian contract law shall adopt mental suffering damages.

Appendix



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 ሰር 24 ቀን 1992 ዓ.ም

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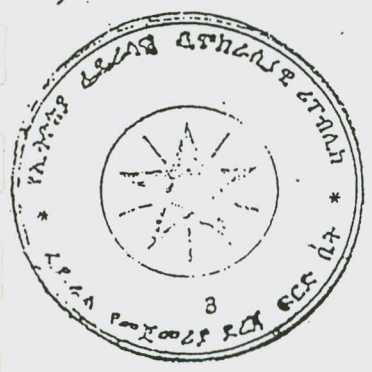
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በከላከልኝ ተከላከልኝ መካከል የተደረገው ውል ፊርማ ከሀሳብ ውጤት ምንድን ነው? የሚለው እዚህ ላይ መታየት ያለበት ነጥብ በመሆኑ እንመለከተዋለን፡፡

በፍ/ብ/ሐ/ቁ 2355/1/ ላይ እንደተደነገገው ውሉ በፊርማ ገዢ ተዋዋዩ በገቡባቸው ገዲታቸው ነፃ ይሆናሉ ይህ ማለት ተዋዋይ ወገኖቹ ለመሬፀም የገቡትን የውል ገ .ታ እንዲፈጽሙ አይገደዱም ማለት ነው፡፡ በዚሁ ለንግድ ገዢ ቁጥር /2/ መሠረት ደገፍ ለንግድ ወገን የውሉን ቃል በውሉ ወይም በከፊል ፊርማ እንደሆነ የሰጠው/ የከፊል/ ነገር እንዲመለስለትና ያወጣው ኪሳራም እንዲከፈለው ለመጠየቅ ይቻላል፡፡ ለሁን በተያዘው ኪሳራ ከሀፈ መድን ከሀፈ መድን ለተከላከሉ ብር 5000/አምስት ሺህ ብር/ መከፈላቸውን በከላከልኝ ላይ ከመ ገለፃቸውም በላይ በምስክርታቸው የተረጋገጠ ሲሆን በሌላው ደገፍ ተከላከልኝ ገንዘቡን ለመቀበላቸውም ሀሳብ በሕገ መድን መሰጠት የሚጠበቅባቸውን ጉዳት ማስተካከላቸውን አስገልጾም፣ አሳስረዱም፡፡-በሀሳብም ተከላከልኝ-የመቼ መኪና ቸውን ተረክበው ከከላከልኝ የተቀበሉትን ብር 5000/አምስት ሺህ ብር/ እና በፍ/ብ/ሐ/ቁ 2356/1/ መሠረት በዚሁ ከወሰዱበት ቀን ጀምሮ ተከፍሎ እስከአለቀ ድረስ ሕጋዊ ወለድ ዘጠኝ በመቶ ለከላከልኝ እንዲከፍሉ ፍጆታ ወሰኗል፡፡ ወዚህ ኪሳራ ገራ ቀኙ ይቻላል፡፡

መዘገቡ ወደ መዘገብ ቤት ተመለሷል፡፡

የዳኛ ፊርማ ወገድም ገታሁን



የዳኛ ፊርማ

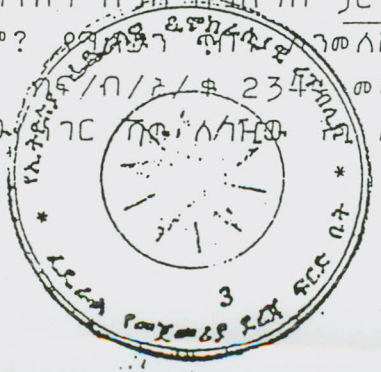
/ቤተ.እ.ኤ.አ. ህዝቡ ጥበቃ አገልግሎት ለሰጡት ሰራተኛዎች ጋር ለማገናዘብ መርዎሯቸዋል፡፡
/ ት በመደመሪያ የመረመረው ተከላኝ ለከላኝ የሽግግር መኪና ጉዳላት የሌለባትና የተ
ተን ለገልገሉት የምትሰጥ ለመሆኗ ቀጢ ያመሆን ሕጋዊ ገዲነት ለሰጣቸው? የሚለውን
ው፡፡ በፍ/ብ/ሥ/ቁ 2287 መሠረት ሻጭ ያስረከቡት ነገር ጉዳላት የሌለበት
ገዢው መደን /ኃላፊ/ ነው? በፍ/ብ/ሥ/ቁ 2289/ሀ/ መሠረት ሻጭ በሕገ
ወጪው መደን ተፈጻሚ የሚሆነው የሽግግር ገቢነት ለተለመደው ለገልገሉት ወይም በገንደ
/መቀመጫ ጥረ ያለሁን ሲሆን ነው፡፡ ለሁሉ በተያዘው ጉዳይም ተከላኝ ለከላኝ
መኪና ታክሲ ለገደመሆኗ መጠን ከላኝ መኪና ዋጋ የገዛነት ለገንደ ለማግለል ብለው
ነ ለመረዳት በገንደም ታክሲዋን ለገንደ መገዛታቸው በቀረቧቸው ምስክርታቸው ተረ
ለ፡፡ ለገዲሁም ደገፍ ከላኝ በከላኝ ላይ መኪና ዋጋ ለገደም ቀን ሣትሠራ መቀሟን ይገባል፡፡
ከሁሉ ምስክርታቸውም ይህንኑ አረጋግጠዋል፡፡ በአንዳንድ ደገፍ ተከላኝ መኪና ዋጋ
ተ.በተን ለገልገሉት መስጠት የምትችል ሽግግር ለሰጠው፡፡ ተከላኝ መኪና ዋጋ
በ አስርተው ለማስረከብ በውሉ በይዘትም የሽግግር መኪና ጉዳላት የሌለባትና የተገ
ተ ለገልገሉት የምትሰጥ ለመሆኗ ለከላኝ መደን የመስጠት ሕጋዊ ኃላፊነት ስላለ
መኪና ዋጋ ለማሠራት የውል ገዲነት ስላለገባሁ ፋይሉ ይዘጋልን ሲሉ ያቀረቡትን
ር ፍ/ቤተ.እ.አ.አ. ስለተቀበለው፡፡

ፍ/ቤተ.እ.አ.አ. የተሰጠው ጥበቃ ከላኝ ከተከላኝ ጋር ያደረጉት ውል
ይ፡፡ ነው ወይስ የሚሰረዝ ነው? የሚለውን ጥበቃ ነው፡፡
በፍ/ብ/ሥ/ቁ 2332 መሠረት ገዢው የተሸጠው ዐቃ ጉዳላት ያለበት መሆኑን
በሚገባ ያስታወቀው ለገደሀት-ውሉን በገዲነት ለማስፈጸም በሚቻለበት ጊዜ ሻጭ
ቃ ቁ የጉዳላትን ለገዲነት ለመጠየቅ ይችላል፡፡
ከላኝ ከተከላኝ የገዛነት መኪና ጉዳላት ያለባትና የማትሠራ መሆኑን በሰጠው
ሁ ለተከላኝ ማስታወቂያቸውን ገለጸው የተከራከረ ሲሆን ተከላኝ ይህን ክርክር
ስታወቀው፡፡ በመሆኑም ከላኝ የገዛነት መኪና ጉዳላት ያለባት መሆኗን ለተከላኝ ለገ
ታቃቸው ለገንዘባለን፡፡

ከላኝም ተከላኝ ያደረጉት ውል የሚፈጸም ነው ወይስ ለይደለም? የሚለውን ጥበቃ
/ብ/ሥ/ቁ 2330 ጋር በማገናዘብ እና ያለን፡፡ በዚህ የሕግ ድንጋጌ መሠረት ገዢው
ተ ነን ዐቃ በምትክ ወይም ከፍ ያለ ወጪ ሳይደርገበት መገዛት የሚችለው ከሀሳብ ሻጭ
ውን ለገዲነት ለመጠየቅ ማስገደድ ለይቻለም፡፡ ለሁሉ በያዘው ጉዳይ ከላኝ የገዛነት
ታክሲ ለገደመሆኗ መጠን በፍ/ቤተ.እ.አ.አ. ገንዘብ ከላኝ ሌላ ታክሲ መገዛት ይችላሉ፡፡
በኩል ደገፍ ከላኝ መኪና ዋጋ ተቀጥረው ከፍ ያለ ውጭ አይደሉም ባለሀሳብ በቀር
ዐማይቸው ለፍ/ቤተ.እ.አ.አ. ለሰጠው፡፡

በሀሳብም ከላኝ ተከላኝ መኪና ዋጋ ለሚሰጡ ለተከላኝ ያስረከቡት ሲሉ
ረቡትን ክርክር ፍ/ቤተ.እ.አ.አ. ስለተቀበለው፡፡
ቀጥለን ከላኝ ተከላኝ ጋር ያደረጉት የመኪና ሽግግር ውል የሚሰረዝ ነው ወይስ
ይለም? የሚለውን ጥበቃ መለከታለን፡፡

በፍ/ብ/ሥ/ቁ 234 መሠረት ዓዲላት እጅግ የሚገዳ ባለሀሳብ በቀር
በሀሳብ ገር ሻጭ ለሀሳብ ሲሆን የሚገባው ጉዳላት የተገኘበት ለገደሀህ



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Law

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